Supreme Court, U.S.
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No. 09-877

In the Supreme Court of the United States

JOHN PUDELSKI,

Petitioner,

v.

GINNY LAMNECK, WARDEN

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Sixth Circuit correctly determine that the state courts' denial of Pudelski's motion for a new trial was constitutional?

2. Did the Sixth Circuit properly conclude that Pudelski's lack of access to a police report relied on by a State expert witness at trial did not violate due process under *Brady v. Maryland*, 373 U.S. 83 (1963)?

LIST OF PARTIES

The Petitioner is John Pudelski, an inmate at the Ohio Correctional Reception Center. The Respondent is Ginny Lamneck, the Warden of the Ohio Correctional Reception Center. Lamneck is substituted for her predecessor, Julius Wilson. See Fed. R. Civ. P. 25(d).

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INTRODUCTION

Petitioner John Pudelski asks this Court to review the Sixth Circuit's decision affirming the district court's denial of habeas on his two certified claims for relief. Specifically, Pudelski argues that he is actually innocent, and that the Sixth Circuit misapplied *Schlup v. Delo*, 513 U.S. 298 (1995), in rejecting his claim that the state courts improperly denied his motion for a new trial. Pudelski also asserts that the Sixth Circuit erred by denying his claim that his lack of access to a police report relied on by a State expert witness at trial violated due process under *Brady v. Maryland*, 373 U.S. 83 (1963).

Pudelski's claims are meritless. First, the Sixth Circuit applied the appropriate standard of review to the merits of his first claim and correctly determined that the state courts' denial of Pudelski's motion for a new trial did not violate due process. And Pudelski's efforts to position his first claim as one of freestanding actual innocence fails, because this Court has repeatedly explained that demonstrating actual innocence is only a gateway to allow habeas review of a procedurally defaulted claim; it is not itself a standalone constitutional claim on which habeas relief is available. See *House v. Bell*, 547 U.S. 518, 536-37 (2006). Second, the Sixth Circuit properly found that the trial court's decision to deny Pudelski's trial counsel access to the police report cited by a State expert witness at trial did not violate *Brady*, because Pudelski did not meet his burden to show that the report, which was not in the record, was either favorable or material.

In addition to being meritless, Pudelski's claims are not worthy of this Court's review. Pudelski's petition requires nothing more than a straightforward application of this Court's law to the facts of this case and presents no significant question justifying certiorari.

COUNTERSTATEMENT

A. Pudelski was convicted and sentenced to fifteen years to life in prison for the murder of his twelve-day-old daughter.

On March 29, 1999, Pudelski's wife awoke to find the couple's twelve-day-old daughter, Elly Marie Pudelski, cold and unresponsive in the corner of her crib. *State v. Pudelski*, No. 77172, 2001 Ohio App. Lexis 1150, at *5 (Ohio Ct. App. Mar. 15, 2001). Pudelski called emergency services and attempted to resuscitate Elly, but the hospital emergency room doctor pronounced her dead on arrival. *Id.* at *6.

Shortly after Elly's death, the police questioned Pudelski and his wife separately, and both denied knowledge of any injury to their daughter—accidental or deliberate. *Id.* at *7-8. Pudelski was the last one with Elly the night she died. *Id.* at *5. He told the lead investigator that he gave Elly her midnight feeding and put her to bed around 1:30 a.m., but had no further contact with her until his wife woke him the following morning. *Id.* at *8.

Because the emergency room records indicated that Elly died from Sudden Infant Death Syndrome ("SIDS") or "crib death"—the sudden, unexplained death of a child under one year—Ohio law required an autopsy. Trial Tr. 375. The autopsy revealed that Elly had a four-inch linear fracture in her skull,

and the coroner, Dr. Elizabeth Balraj, and deputy coroner, Dr. Joseph Felo, determined that Elly had died from cerebral edema (swelling of the brain), which was caused by a blunt impact that had also caused the fracture. *Pudelski*, 2001 Ohio App. Lexis 1150, at *6. Based on the tissue reaction and the amount of liquid in Elly's stomach, they opined that Elly had been injured some time after her midnight feeding, and that she had died around 3:00 a.m. *Id.*; Trial Tr. 427. They also determined that the fracture had occurred less than twenty-four hours before Elly's death, because the edges of the break were sharp and uncallused, fresh blood existed at the fracture site, and no signs of healing were present. *Pudelski*, 2001 Ohio App. Lexis 1150, at *6-7. Because Elly, at only twelve days old, was not yet mobile, her injury could not have been self-inflicted. Trial Tr. 636. Thus, Elly's death was declared a homicide, *id.* at 379, and Dr. Balraj issued a final certificate of death confirming that conclusion, *id.* at 630; *Pudelski*, 2001 Ohio App. Lexis 1150, at *7.

Pudelski was charged with one count of aggravated murder in violation of Ohio Rev. Code § 2903.01 with a death specification, and, alternatively, with one count of murder under Ohio Rev. Code § 2903.02(B). *Pudelski*, 2001 Ohio App. Lexis 1150, at *2. The trial court dismissed the death specification on the State's motion, and granted Pudelski's motion to consider the lesser-included offense of involuntary manslaughter as a proximate cause of child endangering. *Id.* at *3.

The trial centered on the cause of Elly's death. Pudelski claimed that Elly's skull fracture was a birth injury and that Elly died from SIDS. Pudelski

centered his theory on undisputed testimony that at birth, Elly had a caput bruise—a common swelling and bruising caused by pressure at birth that typically does not affect an infant's health—on the right back side of her head. *Id.* at *4. Pudelski offered testimony by several medical experts to show that Elly's skull fracture was in the exact location of her caput, proving that it was a latent injury suffered during a difficult birth. See Trial Tr. 1123-1776.

The State countered that Pudelski had knowingly injured Elly the night she died, and that Elly's fracture was completely separate from her caput, which had been deemed "normal" at birth and, according to the autopsy results, was nearly healed when she died. *Pudelski*, 2001 Ohio App. Lexis 1150, at *9. The State relied primarily on the testimony of Drs. Balraj and Felo regarding their autopsy findings, as well as testimony by Pudelski's wife, medical personnel involved with Elly's birth, and a nurse who visited Elly at home shortly after she was born, all of whom reported that Elly was a normal and healthy baby. *Id.* at *3-4.

The jury found Pudelski not guilty of aggravated murder, but convicted him of murder, and the trial court sentenced him to fifteen years to life in prison. *Id.* at *3.

B. The trial court denied Pudelski's motion for a new trial, and Pudelski was denied relief on direct appeal.

The day before Pudelski's sentencing, his mother discovered an undeveloped roll of film that contained photographs of Elly the day after she was

born. *Id.* at *13. One of the photographs revealed a large red bruise on the back right side of Elly's head. *Id.* Pudelski moved for a new trial under Ohio Criminal Rule 33(A)(6), arguing that the photograph proved that Elly's skull fracture was a birth injury and warranted a new trial. *Pudelski v. Wilson*, 576 F.3d 595, 602 (6th Cir. 2009).

The trial court held a hearing on the motion, at which medical experts, Pudelski's mother, and Drs. Balraj and Felo testified. *Pudelski v. Wilson* (6th Cir. 2009), Tr. of Motion Hr'g., Joint Appendix ("J.A."), Vol. VII, 1340-1733. The court denied Pudelski's motion because it determined that the photograph, though relevant, was merely cumulative of the trial testimony about Elly's caput and would not have changed the outcome of the trial. *Id.* at 1730-33. Basing its ruling on Ohio law only, the court reasoned, "[T]he new evidence is not a new theme, it is not significantly, even a variation of an old theme. . . . This infant had a somewhat difficult birth, she had some type of a surface, hematoma connected with the medical term known as a caput. . . . And the issue of the relationship between the fracture and the caput was fully joined at the time of the trial." *Id.* at 1731-32.

Pudelski appealed the trial court's ruling and raised seven other assignments of error, including that the trial court improperly denied him access to a police report referenced by Dr. Balraj at trial. *Pudelski*, 576 F.3d at 603. At trial, Pudelski moved for access to the report under Ohio Rules of Evidence 612 and 703, but the trial court denied Pudelski's motion because Dr. Balraj testified on voir dire that she had not relied on any specific information in the

report to form her medical opinion that Elly's death was a homicide. J.A., Vol. V, 1171-72. Defense counsel did not move to make the report part of the record at trial. *Pudelski*, 576 F.3d at 614.

The Ohio appeals court affirmed, *Pudelski*, 2001 Ohio App. Lexis 1150, at *19-20, 25, and denied Pudelski's motion for reconsideration and his motion to reopen the appeal, Journal Entry, *State v. Pudelski*, No. 77172 (Ohio Ct. App. Apr. 3, 2001); Journal Entry, *State v. Pudelski*, No. 77172 (Ohio Ct. App. Nov. 8, 2001). The Ohio Supreme Court declined to exercise jurisdiction, *State v. Pudelski*, 751 N.E.2d 483 (Ohio 2001) (Table), and denied Pudelski's motion for reconsideration, *State v. Pudelski*, 756 N.E.2d 116 (Ohio 2001) (Table).

C. Pudelski sought habeas relief, and the district court denied his petition and declined to issue a certificate of appealability.

Pudelski petitioned the federal courts for a writ of habeas corpus, and he moved to stay the habeas proceedings to exhaust certain available state court remedies. *Pudelski*, 576 F.3d at 603. He subsequently moved the trial court to vacate his judgment, but the trial court denied his petition, and the appeals court affirmed. *State v. Pudelski*, No. 85989, 2006 Ohio App. Lexis 733, at *19 (Ohio Ct. App. Feb. 23, 2006).

On Pudelski's motion, the district court lifted the stay, and the magistrate judge issued a report and recommendation advising the district court to deny Pudelski's petition. Report and Recommendation, No. 1:02-cv-01441, at 26 (N.D.

Ohio) (Doc. No. 38). Over Pudelski's objections, the district court adopted the magistrate's Report and Recommendation in full, denying Pudelski's petition and refusing to grant a certificate of appealability ("COA") on any of his claims. *Pudelski v. Wilson*, No. 1:02-cv-01441, 2007 U.S. Dist. Lexis 39540, at *5-6 (N.D. Ohio May 30, 2007).

D. The Sixth Circuit granted Pudelski's request for a COA on two issues, but the panel denied Pudelski's petition and the court denied en banc review.

Pudelski appealed to the Sixth Circuit, which granted a COA on two claims: (1) whether the trial court erred in denying Pudelski's motion for a new trial based on the late-discovered photograph; and (2) whether the trial court erred in prohibiting Pudelski and his trial counsel from having access to the police report upon which Dr. Balraj relied in her expert testimony. See *Pudelski v. Wilson*, No. 1:02-cv-01441, at 2 (N.D. Ohio) (Doc. No. 48).

The Sixth Circuit panel denied Pudelski's two certified claims. *Pudelski*, 576 F.3d at 607, 615. As to Pudelski's first claim, the Sixth Circuit rejected the district court's determination that Pudelski's new trial motion was a post-conviction proceeding for which habeas relief was unavailable. *Id.* at 607-10.[1]

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[1] The Sixth Circuit rejected the district court's analysis and held that "motions for a new trial filed before a state defendant initiates his or her direct appeal, and subsequently reviewed during that direct appeal, are not post-conviction proceedings and do not preclude a federal habeas court from reviewing the denial of the motion for a new trial for constitutional error." *Pudelski*, 576 F.3d at 607.

In affirming the denial of the claim on its merits, the panel held that the trial court's denial of Pudelski's motion for a new trial did not deprive Pudelski of due process or a fundamentally fair trial, because the new photograph was cumulative of the trial testimony about Elly's caput and would not have changed the jury's verdict. *Id.* at 612.

Although the panel was divided on Pudelski's second claim, the majority denied the claim on its merits. *Id.* The court concluded that the trial court's decision to deny Pudelski access to the police report did not prejudice Pudelski or deny him a fundamentally fair trial because Dr. Balraj did not rely on the report in deriving her medical opinion. *Id.* at 613. The court further concluded that the trial court's decision did not violate *Brady* because, regardless of the report's potential impeachment value, Pudelski could not establish that the report was material. *Id.* at 613-15. The court also explained that Pudelski's attorney should have moved to admit the report into evidence. *Id.* at 615.

The Sixth Circuit denied Pudelski's petition for rehearing and rehearing en banc. *Pudelski v. Wilson*, No. 07-3856, 2009 U.S. App. Lexis 23706 (6th Cir. Oct. 26, 2009). Pudelski's petition for a writ of certiorari followed.

REASONS FOR DENYING THE WRIT OF CERTIORARI

A. AEDPA governs federal court review of Pudelski's petition for a writ of habeas corpus.

To grant habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),

28 U.S.C. § 2254, a federal court must conclude that the state court's adjudication of a claim on its merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2008). A federal habeas court cannot grant a writ under this clause "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). The court must also conclude that the application of the principle was unreasonable. *Id.* A federal habeas court can evaluate the state court decision only in light of this Court's holdings at the time that the decision was made. *Id.* at 412.

To prevail on his petition, then, Pudelski must show that the state courts' denial of his motion for a new trial or decision denying him access to the police report was contrary to or an unreasonable application of this Court's clearly established precedent as of 2001. Pudelski can show neither. For these reasons, and those set forth below, this Court should deny Pudelski's petition.

B. The Sixth Circuit did not misapply *Schlup v. Delo* in rejecting Pudelski's claim that the trial court's denial of his motion for a new trial violated due process.

Pudelski asserts that he is actually innocent, and that the Sixth Circuit misapplied *Schlup v. Delo* in denying his claim that the state courts' denial of his motion for a new trial violated his right to due process. He argues that the Sixth Circuit incorrectly

invoked "[a] mixed standard of state court deference and sufficiency of the evidence" to reject his claim, when it should have evaluated all of the evidence, including the photograph found after trial, from the prospective of a reasonable juror, as directed by this Court in *Schlup*. Petition for Writ of Certiorari ("Pet.") at 14.

At trial, Pudelski presented testimony by medical experts that Elly's skull fracture occurred at birth and was unrelated to her death, but none of the experts could cite to any direct evidence to support that position. Instead, they based their opinions on their review of Elly's birth records and her autopsy report. Pudelski asserts that the new photograph of the bruise on Elly's head is the direct evidence that he lacked at trial, and that the trial court erred by ignoring the fact "that physical proof of the injury is far more persuasive to a juror than the theory of a defense expert." Pet. at 15. But Pudelski is wrong.

As a threshold matter, the Sixth Circuit applied the proper standard of review to the merits of Pudelski's first claim for relief. As directed by AEDPA, the Sixth Circuit correctly evaluated whether the state courts' denial of Pudelski's motion for a new trial was contrary to or involved an unreasonable application of this Court's clearly established precedent. See *Williams*, 529 U.S. at 411. Thus, because the merits of Pudelski's claim are premised on issues of state law, which are not subject to habeas review, see *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991), the court evaluated only whether the state courts' denial of Pudelski's new trial motion "was 'so egregious' that it violated his

right to a fundamentally fair trial," *Pudelski*, 576 F.3d at 611 (citations omitted).[2]

As noted above, in denying Pudelski's motion, the trial court found that the photograph was cumulative of the trial testimony about Elly's caput, and that its introduction would not have changed the jury's verdict. J.A., Vol. VII, 1730-33. The appeals court agreed. *Pudelski*, 2001 Ohio App. Lexis 1150, at *15. The Sixth Circuit applied the foregoing standard of review to determine that the state courts' denial of Pudelski's new trial motion did not violate his constitutional rights because, "even if the new photograph of Pudelski's daughter had been presented at trial, reasonable jurors could still have found him guilty." *Pudelski*, 576 F.3d at 611. The Sixth Circuit's decision was correct for three reasons.

First, the photograph is not conclusive evidence that Elly had suffered a skull fracture at birth. In fact, Pudelski's own expert witnesses testified that a linear skull fracture like Elly's could only be discovered with an x-ray. See J.A., Vol. VI, 1277. As the Sixth Circuit explained, "the mere depiction of a red bruise on [Elly's] head does not establish that a skull fracture existed underneath the bruise." *Pudelski*, 576 F.3d at 612. The photograph's value is further undermined by the State's evidence that the fresh blood at the site of the fracture and the uncallused edges of Elly's skull indicated that she

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[2] AEDPA deference applies because the state courts' denial of Pudelski's motion was an "adjudicat[ion] on the merits." 28 U.S.C. § 2254(d). Even if § 2254(d) were inapplicable, however, the federal courts still would defer to the state courts' factual findings, see 28 U.S.C. § 2254(e)(1), and reach the same determination.

had been injured within twenty-four hours of her death. *Id.*

Second, the photograph is cumulative. At trial, Pudelski's experts opined that Elly's skull fracture was a birth injury, but the jury rejected that theory in favor of the State's position that Pudelski had inflicted the injury on his daughter. *Id.* And more important, the State never disputed that Elly had a caput when she was born, so the jury had already considered Pudelski's argument that the bruise indicated the existence of a fracture at birth. *Id.* By its verdict, however, the jury adopted the State's argument that the skull fracture and resulting cerebral edema were new injuries. Thus, as the Sixth Circuit concluded, "[a] photograph of the bruise, when direct testimony had already established its existence, adds nothing of significance to the evidence presented at trial and would not compel a juror to credit Pudelski's expert witness testimony and discredit the State's evidence." *Id.* at 612.

Finally, Pudelski's attempt to restyle his first claim of relief by labeling it an "actual innocence" claim is a non-starter. It is well established that a freestanding claim of actual innocence "does not by itself provide a basis for relief." *Schlup*, 513 U.S. at 314.[3] Rather, an actual innocence claim is merely a "gateway through which a habeas petitioner must

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[3] In *House v. Bell*, 547 U.S. at 554-55, this Court recognized that, hypothetically, a truly persuasive claim of actual innocence could render unconstitutional the execution of an innocent person if there were no available state avenue to review the actual innocence claim. But *House* is inapposite because Pudelski did not receive a capital sentence.

pass to have his otherwise barred constitutional claim considered on the merits," *id.* at 315, where he can show "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt," *id.* at 327 (citing *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). *Schlup* is inapposite because Pudelski's constitutional claims do not arise from his assertion of actual innocence. Rather, they are based on Pudelski's contention that the trial court abused its discretion and misapplied Ohio law when denying his motion for a new trial under Ohio Criminal Rule 33(A)(6), and that the appeals court's affirmance denied him due process.

Regardless, the Sixth Circuit could not have misapplied *Schlup* where it did not even consider *Schlup* in excusing procedural default. The Sixth Circuit excused Pudelski's procedural default of his first claim for relief because it found that it could affirm the district court's dismissal of that claim on its merits, and the State did not argue the issue on appeal. *Pudelski*, 576 F.3d at 605. In citing *Schlup*, the court merely explained in a footnote that both the magistrate and the district court had incorrectly articulated the "demanding" *Schlup* standard in excusing procedural default below, and noted that Pudelski's claim was not the "extraordinary case" that could have satisfied the *correct* standard. *Id.* at 606 n.2.

For all these reasons, this Court need not revisit the Sixth Circuit's sound determination that the state courts' decision to deny Pudelski's motion for a new trial was not contrary to or an unreasonable application of this Court's precedent.

C. The Sixth Circuit correctly rejected Pudelski's claim that his lack of access to the police report denied him due process in violation of *Brady v. Maryland*.

Pudelski claims that the Sixth Circuit erred in denying his second claim for relief because under *Brady*, the disputed police report contained valuable impeachment evidence that was material to his defense. Pet. at 19-20. Specifically, he asserts that various State witnesses testified inconsistently about what led them to believe that Elly's death was a homicide rather than an accident, and that the police report would have allowed him to impeach Dr. Balraj's testimony by revealing that she was unfamiliar with or overstating the value of the police investigation. *Id.* at 21-22. That is not so.

In *Brady*, this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The duty to disclose such evidence applies even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and it encompasses both exculpatory and impeachment evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985). A petitioner bears the burden of establishing a *Brady* claim. *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000). Pudelski cannot meet that burden because he cannot establish either that the report contains valuable impeachment evidence, or that that evidence was material.

Pudelski asserts that that the report contained valuable evidence that would allow him to impeach the credibility of Dr. Balraj's testimony that she had only relied on the report to rule out accident and had not used it in medically determining the cause of Elly's death. Pet. at 21. Pudelski argues that Dr. Balraj's testimony was undermined by the testimony of Dr. Felo and the lead investigator that they "had no information from which to conclude" that Elly's death had resulted from a crime, and that having access to the report would have allowed him to demonstrate that Dr. Balraj conducted her investigation with a preconceived notion that a homicide had occurred. *Id.*

But Pudelski's position is groundless. As the Sixth Circuit correctly determined, because the report is not in the record, and Pudelski's counsel did not move to admit it, see *Pudelski*, 576 F.3d at 614 n.3, Pudelski's suggestion that it has impeachment value is rooted in nothing but his own speculative assessment of witness testimony. Such baseless theories are insufficient to establish that the police report contained favorable impeachment evidence. See *United States v. Driscoll*, 970 F.2d 1472, 1482 (6th Cir. 1992); see also *Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000) (noting that conclusory or "purely speculative" claims of *Brady* violations are insufficient to obtain relief).

But even if the police report contained potentially helpful impeachment evidence, Pudelski cannot establish a *Brady* claim where he cannot show that the evidence is material. See *Brady*, 373 U.S. at 87. Evidence is "material" to guilt or punishment "if there is a reasonable probability that,

had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682; accord *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995). In other words, a defendant meets the materiality standard for *Brady* claims when "the favorable evidence could be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Banks*, 540 U.S. at 698 (citation omitted).

To argue materiality, Pudelski cites repeatedly to the dissent's conclusion that there "[was] a reasonable likelihood that the report . . . could have been used to impeach a critical state witness who testified unequivocally as to the cause of [Elly's] death," *Pudelski*, 576 F.3d at 615 (Clay, J., dissenting), and asserts that the report "must cast doubt on the credibility of [Dr. Balraj,] who supplied the only evidence of Petitioner's criminal conduct, in the form of expert opinions, in this circumstantial evidence case," Pet. at 22-23. The dissent opined that Pudelski presented enough evidence that the report contained sufficient impeachment material to warrant a remand to the district court for further factfinding on the report's contents, and a new determination of whether the trial court erred in denying his new trial motion. *Pudelski*, 576 F.3d at 618-19 (Clay, J., dissenting). Further, the dissent found it "untenable" for the majority to "fault Pudelski for failing to produce a report that he himself requested." *Id.* at 618-19. But Pudelski's position is not legally sound.

As a threshold matter, Pudelski's reliance on the dissent's speculation as to the report's contents is misplaced. "Comments in the dissenting opinion . . .

are just that: comments in a dissenting opinion." *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 177 n.10 (1980). Moreover, the dissent's suggestion that the court "routinely" remands a case for an evidentiary hearing to determine materiality is inaccurate. See *Pudelski*, 576 F.3d at 619 (Clay, J., dissenting). In fact, many courts have found that "'[m]ere speculation that a government file may contain *Brady* material is not sufficient to require a remand for in camera inspection, much less reversal for a new trial.'" *United States v. Quinn*, 123 F.3d 1415, 1422 (11th Cir. 1997) (quoting *United States v. Andrus*, 775 F.2d 825, 143 (7th Cir. 1985)); accord *Driscoll*, 970 F.2d at 1482. Further, Pudelski has not, and cannot, cite any authority for his argument that the Sixth Circuit's rejection of his claim without considering the report itself violates 28 U.S.C. § 2254(d) and (e)(1), as well as due process. To the contrary, "'[a] due process standard which is satisfied by mere speculation would convert *Brady* into a discovery device and impose an undue burden upon the district court.'" *Quinn*, 123 F.3d at 1422 (quoting *Andrus*, 775 F.2d at 143).

Finally, Pudelski's claim that the report would have changed the outcome of his trial does not establish materiality where the report itself is not in the record because of an error by Pudelski's own counsel. As the Sixth Circuit noted, "[n]ormally, when a disputed item of evidence is excluded by the trial judge, a proffer is made regarding [the excluded document, and] the document itself is directed to be made a part of the record in order that a reviewing court can properly determine whether the trial court's ruling was correct." *Pudelski*, 576 F.3d at 614 n.3; accord *United States v. Avellino*, 136 F.3d 249,

261 (2d Cir. 1998); see 1-12 Federal Criminal Procedure Litigation Manual. There is no dispute that Pudelski's counsel made no such proffer here. Thus, Pudelski cannot now profit from the fact that the report was never made a part of the record. Accordingly, as the Sixth Circuit concluded, "[i]t is simply not reasonable to conclude that [Pudelski's] hypothetical uses of the report, based on absolute speculation as to the contents of a report we have not seen, could even come close to meeting the burden that the law places on the petitioner to show that the police report contained material evidence." *Pudelski*, 576 F.3d at 615.

D. Pudelski has neither raised an unresolved constitutional question that this Court needs to answer, nor alleged or offered evidence of a division among lower courts on the question presented.

Pudelski offers no other convincing reason for this Court to grant review. Pudelski's petition identifies no confusion in the lower courts as to the standards for evaluating either of his two claims for relief, both of which involve the routine application of well-settled law to the facts. Also, in challenging the Sixth Circuit's denial of his claims, Pudelski does not raise an unresolved constitutional question that this Court needs to answer.

CONCLUSION

For the foregoing reasons, Pudelski's petition for writ of certiorari should be denied.

Respectfully submitted,

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